Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

MORTIMER L. GRANT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Appellant Pro Per

24 pp

QUESTION PRESENTED

1. Whether a dismissal of an appeal on the merits from a decision by the United States Tax Court for failure to pay a monetary sanction imposed by the Ninth Circuit in an unrelated and prior appeal without affording an appellant the opportunity to pay the sanction before dismissing the appeal violates the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding were M. Leslie Grant, and the United States of America.

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OPINIONS BELOW

The opinion of the Ninth Circuit sought to be reviewed is ***Mortimer L. Grant v. Commissioner of Internal Revenue***, No. 96-71077 (9th Circuit, March 14, 1997), an unpublished opinion. This opinion is reprinted in the accompanying Appendix.

JURISDICTION

The opinion of the court of appeals in this case was filed on March 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case concerns the Fifth Amendment of the United States Constitution, specifically the Due Process Clause, which is reprinted in Appendix B.

STATEMENT OF THE CASE

A. Introduction.

The Internal Revenue Service served a statutory notice of deficiency on Mortimer L. Grant (hereinafter "Grant") on January 24, 1996 for the tax periods 1976, 1977, and 1978. The statutory notice alleged that Grant had failed to report capital gains for these years.

The IRS computed the purported tax liability without determining or allowing a cost basis for the subject properties.

Grant timely petitioned the United States Tax Court ***pro per***, and he asserted in his Amended Petition that the IRS erred by determining that he "had unreported gross receipts, for taxable years 1976 through 1978, in the amounts" stated in the statutory notice, and that "the agency is ... entitled to penalties and interest on amounts purported by the agency which the Petitioner disputes." Grant requested that the Tax Court redetermine the deficiency by finding that "there is no deficiency in income tax and no additions to the tax due from the Petitioner."

On June 28, 1996, the Commissioner filed a motion to dismiss Grant's Petition for failure to state a claim. The Commissioner argued that Grant's Amended Petition did not comply with Tax Court Rules 34(b)(4) and (b)(5) by asserting "justiciable error ... with respect to the merits of the Commissioner's determination of the deficiencies and additions to tax...." The Commissioner's motion was granted by the Tax Court for failure to comply with Rules 34(b)(4) and (b)(5).

B. Procedural History.

On January 24, 1996, the Commissioner of the Internal Revenue Service served Grant with a statutory notice of deficiency for the tax periods 1976, 1977, and 1978. Grant timely petitioned the Tax Court, and he filed an Amended Petition on June 15, 1996.

On June 28, 1996, the Commissioner filed a Motion to Dismiss for failure to state a claim. After Grant filed various responses to the Motion to Dismiss, the Tax Court granted the Commissioner's motion on October 31, 1996. The thrust of the Tax Court's Order of Dismissal and Decision was that Grant failed to strictly comply with Tax Court Rules 34(b)(4) and (b)(5).

On November 12, 1996, Grant timely filed a Notice of Appeal of Final Decision to the United States Court of Appeals for the Ninth Circuit. On February 21, 1997, United States filed a Motion to Dismiss Appeal and a Motion to Hold Briefing Schedule in Abeyance. United States argued that the appeal should be dismissed, since the Tax Division had no record that Grant had paid any portion of a sanction imposed against him and his wife, Alice M. Grant, in a previous appeal to the Ninth Circuit. On February 10, 1993, in an unpublished decision, the Ninth Circuit affirmed a

district court's order and imposed a $1,500.00 sanction. See ***United States v. Grant***, No. 91-56344 (9th Cir., February 10, 1993). United States relied primarily on the Ninth Circuit's decision in ***Hymes v. United States***, 993 F.2d 701, 702 (9th Cir. 1993) in support of its Motion to Dismiss Appeal.

Contemporaneously with filing its Motion to Dismiss Appeal, United States sent Grant a letter concerning the previous sanction. This was the first correspondence or contact Grant had received from the Department of Justice concerning the sanction. Although the Ninth Circuit had imposed a sanction, Grant was neither instructed by the Court nor the Department of Justice to whom the sanction was to paid or where to send the payment. The letter from the Department of Justice was dated February 21, 1997, and it informed Grant for the first time that a check or money order, made payable to the "United States Department of Justice," should be sent to Mr. William E. Thompson, Jr. with the Post Litigation Procedures Unit.

On March 3, 1997, Grant responded to United States' Motion to Dismiss Appeal. Grant effectively argued that he was entitled to appeal as a matter of right. Grant further argued that the case authority cited in United States' motion limited dismissal to

cases where the second case concerned the same issues as the first, and his arguments advanced different issues.

In any event, Grant moved the Court to deny United States' Motion to Dismiss or, in the alternative, to allow him time to pay the previous sanction.

On March 14, 1997, without allowing Grant time to pay the sanction, or even acknowledging that he had requested time to pay same, the Ninth Circuit granted United States motion and dismissed the appeal "because of appellant's failure to pay sanctions imposed against him by this court in ***United States v. Grant***, No. 91-56344.."

REASONS FOR GRANTING THE WRIT

In ***Hymes v. United States***, 993 F.2d 701 (9th Cir. 1993), the Ninth Circuit effectively reversed former precedent without an ***en banc*** review. See e.g., ***Hacopian v. United States Department of Labor***, 709 F.2d 1295 (1983). The ***Hymes*** decision has established an automatic rule for dismissal of appeals without notice and an opportunity to pay when a monetary sanction has been imposed in any other judicial proceeding. The ***Hymes*** summary dismissal method of appeals has been applied by the Tenth

Circuit in ***Depew v. Commissioner of Internal Revenue***, 1995 U.S. App. LEXIS 24380 (10th Cir. 1995).

This has created a split in the Circuit Courts on how subsequent appeals should be determined when unpaid monetary sanctions have been imposed but not paid. See ***Christensen v. Ward***, 916 F.2d 1485 (10th Cir. 1990); ***Freed v. United States***, 875 F.2d 863 (6th Cir. 1989); ***Stelly v. Commissioner of Internal Revenue***, 804 F.2d 868 (5th Cir. 1986); ***Schiff v. Simon & Schuster, Inc.***, 766 F.2d 61, 62 (2nd Cir. 1985); ***United States v. Sperling***, 506 F.2d 1323, 1345 n. 33 (2nd Cir. 1974), ***cert. denied***, 420 U.S. 962 (1975); ***Weidenfeld v. Pacific Improvement Co.***, 101 F.2d 699, 700 (2nd Cir. 1939).

The Ninth Circuit's ***Hymes*** case departed from its former rulings by summarily dismissing appeals when a previous sanction has been imposed in any case involving any claim which had not been paid before the subsequent appeal was filed.

Summary dismissals of appeals without prior notice and an opportunity to pay the sanction violates the Due Process Clause of the Fifth Amendment. Prior to the ***Hymes*** decision, all Circuits afforded appellants an opportunity to pay a previous sanction before

dismissing an appeal with prejudice.

ARGUMENT

I. WHETHER A DISMISSAL OF AN APPEAL ON THE MERITS FROM A DECISION BY THE UNITED STATES TAX COURT FOR FAILURE TO PAY A MONETARY SANCTION IMPOSED BY THE NINTH CIRCUIT IN AN UNRELATED AND PRIOR APPEAL WITHOUT AFFORDING AN APPELLANT THE OPPORTUNITY TO PAY THE SANCTION BEFORE DISMISSING THE APPEAL VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Beginning with the Ninth Circuit decision in ***Hymes v. United States***, 993 F.2d 701 (9th Cir. 1993), the Ninth Circuit departed from its former decision ***Hacopian v. United States Department of Labor***, 709 F.2d 1295 (1983), which held that a court has the inherent power to dismiss a case for the nonpayment of costs in a prior involuntarily dismissed action that made the same claim. In fact, the Court reversed and remanded the case to the district court for a determination of whether the first suit involved the same claim as the second. See also ***Christensen v. Ward***, 916 F.2d 1485 (10th Cir. 1990); ***Stelly v.***

Commissioner of Internal Revenue, 804 F.2d 868 (5th Cir. 1986); ***Weidenfeld v. Pacific Improvement Co.***, 101 F.2d 699, 700 (2nd Cir. 1939). The summary dismissal of an appeal without affording appellants an opportunity to pay a sanction is unprecedented in American Jurisprudence, and Grant contends a denial of due process of law.

The Ninth Circuit's ***Hymes*** case departed from its former rulings by summarily dismissing appeals when a previous sanction has been imposed in any case involving any claim which had not been paid before the subsequent appeal was filed. The ***Hymes*** Court relied on the Second Circuit case of ***Schiff v. Simon & Schuster, Inc.***, 766 F.2d 61, 62 (2nd Cir. 1985) to support its decision.

The Second Circuit ***Schiff*** decision concerned sanctions previously imposed against Schiff that were not paid. Notwithstanding the fact that the former sanctions were unpaid, the ***Schiff*** Court allowed him time to pay the sanction: "Appellant will not be permitted to proceed with his pending appeal unless the $2,500 damages previously assessed pursuant to Rule 38 are promptly paid." ***Schiff***, ***supra*** at 62. This was in accord with the universal rulings of federal courts. ***United States v. Sperling***, 506 F.2d 1323, 1345 n. 33 (2nd Cir. 1974), ***cert. denied***, 420 U.S. 962

(1975); ***World Athletic Sports Corp. v. Pahlavi***, 267 F.Supp 160, 163 (S.D.N.Y. 1966) ("The staying of suits pending the payment of costs incurred in prior actions involving the same parties and the same (or similar) subject matter is now universal.").

The ***Hymes*** case has been cited numerous times in the Ninth Circuit to summarily dismiss appeals without affording individuals prior notice and an opportunity to pay the sanction. See e.g., ***Blankstyn v. United States***, 77 A.F.T.R.2d (P-H) 1588 (9th Cir. 1996); ***United States v. Mason***, 75 A.F.T.R.2d (P-H) 590 (9th Cir. 1994). The ***Hymes*** summary dismissal is also being used by the Tenth Circuit. See ***Depew v. Commissioner of Internal Revenue***, 1995 U.S. App. LEXIS 24380 (10th Cir. 1995).

Summary dismissals of appeals without prior notice and an opportunity to pay the sanction violates the Due Process Clause of the Fifth Amendment. Prior to the ***Hymes*** decision, all Circuits afforded appellants an opportunity to pay a previous sanction before dismissing an appeal with prejudice. In ***Freed v. United States***, 875 F.2d 863 (6th Cir. 1989), for example, the Sixth Circuit dismissed the appeal, but it was dismissed without prejudice and subject to reinstatement if appellant paid the sanction. "The instant appeal is hereby dismissed without prejudice to

reinstatement in the event plaintiff presents this court with proof of compliance with the Rule 38 sanctions previously imposed. Application for reinstatement is to be made to this court no later than fourteen (14) days from entry of this judgment."

In the instant matter, the Ninth Circuit Panel made certain that Grant's appeal was permanently barred from being heard: "No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." This is not withstanding the fact that Grant sought to pay the sanction if United States' Motion to Dismiss Appeal was granted.

It is certain that the Ninth Circuit's summary dismissal of appeals, now applied by the Tenth Circuit, is contrary to other Courts of Appeal decisions, and the ***Hymes*** case is a substantial departure from previous precedents and unconstitutional.

It is noteworthy that the sanction against Grant was also imposed in violation of the Due Process Clause. In 1994, effective December 1, 1994, Rule 38 of the Federal Rules of Appellate Procedure was amended to provide: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable

opportunity to respond, award just damages and single or double costs to the appellee." See Communication from the Chief Justice, The Supreme Court of the United States, H.R. Doc. No. 247, 103d Cong., 2d Sess. 69-70 (1994).

It would seem logical to Grant that the imposition of a sanction without notice and an opportunity to respond should not be enforced by a summary dismissal of an appeal without notice and an opportunity to pay.

The Bill of Rights was intended to place a limit on the use of Government force. George Washington stated that: "Government is not reason, it is not eloquence -- it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action." Likewise, Woodrow Wilson, in his book, ***The State***, explained what is government: "Government, in its last analysis, is organized force." In essence, it is a series of edicts backed by a constabulary -- a physical force. Obey, or take the consequences!

Our Founding Fathers intended the Bill of Rights to be enforced by the Judicial Branch and limit Government force and compulsion. Our matchless Constitution and the Bill of Rights limited organized

force -- government -- more severely than ever before in all history. Governmental force can be symbolized by the clenched fist. Find out what the fist can and cannot do and you will know what government should and should not do, not necessarily what it will and will not do. It is obvious what the fist can do -- it can inhibit, restrain, prohibit, and penalize.

Our Constitution and the Bill of Rights were intended to draw the line between what Government should and should not do. Regardless of the historical record of governments overstepping their bounds, as in the instant matter, limited government is an absolute necessity if liberty is to prevail in our nation. Liberty is impossible ***with*** unlimited government. It is abundantly clear that unlimited government is tyranny: Absolute power arbitrarily administered. The administrators of tyranny are tyrants. What is a tyrant? S.C. Champion has brilliantly defined the tyrant as "only the slave turned inside out." What is a slave? According to the dictionary, a slave is "a human being who is (1) absolutely subject to another human being," and (2) "a person who is completely dominated by some influence, habit."

Liberty is impossible short of an understanding of what it is, impossible ***without*** limited government, and impossible ***with*** unlimited government. The Ninth

Circuit Panel's dismissal with prejudice of Grant's appeal is the antithesis for what our nation has stood. The Panel's decision failed to provide notice and an opportunity to pay the sanction imposed by a previous Ninth Circuit Panel. This is notwithstanding the fact that Grant requested time to pay. History teaches that when individuals, specifically Americans, are denied their right to petition government for redress of grievances, they seek redress elsewhere. The American Revolution is a perfect example.

CONCLUSION

The important federal question presented here, which the Ninth Circuit decided in conflict with its former precedents without ***en banc*** review, is whether an order of dismissal with prejudice without notice and opportunity to pay a previous sanction, violates the Due Process Clause of the Fifth Amendment. The importance of this question requires that this Court grant the requested writ.

Grant responded in opposition to United States' Motion to Dismiss Appeal, and he requested time to pay the sanction imposed against him in an unrelated appeal if the Government's motion was granted. Grant was not noticed in the previous appeal that he was subject to a summary dismissal in subsequent appeals

if the sanction was not paid. Neither the Ninth Circuit Panel nor the Department of Justice instructed Grant to whom he was to pay the sanction nor where it should be sent. In fact, Grant never heard from the Department of Justice concerning the payment of the sanction, until United States filed its motion to dismiss.

WHEREFORE, petitioner requests that this Court grant his Petition for a Writ of Certiorari to review and reverse the decision of the Ninth Circuit and remand for reinstatement of Grant's appeal.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-71077
IRS #6990-96

MORTIMER L. GRANT,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ORDER

Before: SNEED, LEAVY and THOMAS, Circuit Judges

Appellee's motion to dismiss this appeal because of appellant's failure to pay sanctions imposed against him by this court in ***United States v. Grant***, No. 91-56344 is granted. This appeal is dismissed. See ***Hymes v. United States***, 993 F.2d 701, 702 (9th Cir. 1993).

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX B - 1

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.